

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

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In the Matter of:

A Review of the Adequacy of            )  
Kentucky's Generation Capacity        )  
and Transmission System                )     Administrative Case No. 387

PUBLIC SERVICE  
COMMISSION

**REQUEST FOR CLARIFICATION OR REHEARING  
OF KENTUCKY POWER COMPANY**

**I. INTRODUCTION**

Pursuant to KRS 278.400, Kentucky Power Company d/b/a American Electric Power Company ("Kentucky Power" or "the Company") seeks clarification or, in the alternative, rehearing of the Interim Order issued by the Commission in this case on March 29, 2004 ("Interim Order"). The subject of this request concerns certain contracts under which Kentucky Power purchases power and energy produced by the Rockport generating plant ("Rockport Agreements"). The Interim Order can be construed to require extension of these agreements beyond their December 31, 2004 expiration date. However, since the Rockport agreements affect customers in other states, Kentucky Power is not presently in a position to assure their extension.

Kentucky Power seeks clarification that the statement at page 14 of the Interim Order that "Absent any evidence that to show that these [Rockport agreement] extensions are detrimental to ratepayers, Kentucky Power should take the necessary steps to secure the contract extension prior to December 30, 2004" is not a final order directing Kentucky Power to enter into the contract extension in question. The context of the quoted statement and other language in the Interim Order strongly suggest that the statement is not a final order directing such a contract

extension. However, if the statement is intended to be such a final directive, AEP seeks rehearing of the order for the reasons stated in this filing.

## II. BACKGROUND

On December 20, 2001, the Commission issued an order in this proceeding setting forth findings on the level of existing and planned generation capacity and the adequacy of the transmission system for Kentucky's six major jurisdictional electric utilities, including Kentucky Power. The order directed the utilities to conduct two studies and to file certain information with the Commission. Among other things, the utilities were directed to study the feasibility of joint ownership of generating stations and coordination of scheduled maintenance. The utilities submitted a Joint Feasibility Report on June 28, 2002.

In its Interim Order, the Commission addresses the joint ownership and coordinated maintenance issues, then discusses projected reserve margins, generation capacity additions and transmission plans for each of the utilities.

At pages 11 and 12 of the Interim Order, the Commission states that with the exception of Kentucky Power, it accepts the utilities' analysis of reserve margins, and indicates that it will address that subject in the section on generating capacity additions. In the section on generating capacity additions, the Commission discusses the fact that Kentucky Power is required to participate in the AEP power pool, and that the Company has two wholesale purchased power contracts "with an affiliate owned generating unit in Rockport, Indiana". The Commission notes that this arrangement is set to expire on December 31, 2004, and goes on to state as follows:

On December 17, 2002, the Commission approved an extension of these contracts as part of its approval of an overall restructuring of AEP in Case No. 2002-00039. As approved, these contract extensions would maintain Kentucky Power's existing generating capacity for the next several years. However, at an informal conference on February 7, 2003, AEP explained that it would not

extend the Rockport contracts due to its decision to forego its restructuring plan.

In its Order approving AEP's corporate restructuring, the Commission found that extending the Rockport purchase power contracts was in the best interest of Kentucky Power and its ratepayers. Absent any evidence to show that these contract extensions are detrimental to ratepayers, *Kentucky Power should take the necessary steps to secure the contract extension prior to December 30, 2004.*<sup>1</sup>

In its Summary of Findings at pages 21 and 22 of the Interim Order, the Commission reiterates that that with the exception of Kentucky Power, the Commission accepts the Utilities' individual analysis of their reserve margins, and states that "The Commission will address the issue of Kentucky Power's reserve margins as part of its review of the IRP scheduled to be filed by June 30, 2006, as ordered in Case No. 2002-00039."<sup>2</sup> The Commission goes on to indicate that "As with the analyses of reserve margins, with the exception of Kentucky Power, the Commission accepts the Utilities' individual capacity additions....The Commission will address the issue of Kentucky Power's need for additional capacity and the Rockport contract extensions in the near future."<sup>3</sup>

In the Ordering paragraphs, the Commission, among other things, directs the utilities to continue to include analyses of reserve margins in their Integrated Resource Planning filings and to continue to file the information set forth in Appendix G of the Commission's December 20, 2001 Order, with the exception of Items No. 1, 2, 5, 9 and 10 (that is, information on peak demands, reserve margins and targets, outages, retirements planned generation and transmission

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<sup>1</sup> Interim Order, p. 14 (*emphasis added*). In fact, AEP indicated at the February 7, 2003 informal conference that the extension was part of a settlement agreement but that the conditions precedent to the settlement had not come to pass. In addition, AEP further indicated it would work with Kentucky and other stakeholders to see whether an accommodation could be reached.

<sup>2</sup> Finding No. 3

<sup>3</sup> Finding No. 4.

capacity additions and similar information) by March 1 of each year. The Ordering paragraphs make no reference to the Rockport contract extensions discussed in the body of the Interim Order.

### **III. REQUEST FOR CLARIFICATION**

Kentucky Power respectfully requests the Commission to clarify that the Commission did not intend the statement that “Kentucky Power should take the necessary steps to secure the contract extension prior to December 30, 2004” to constitute an order or a directive to Kentucky Power to cause the agreements to be extended.

The totality of the Interim Order strongly suggests that the Commission did not intend such a directive. In its Findings, the Commission indicated that it would address the subject of Kentucky Power’s reserve margins in the IRP to be filed in 2006, and will address the Rockport contract extension “in the near future”. The Ordering paragraphs do not contain any directive to Kentucky Power to extend the Rockport contracts, but merely direct the Kentucky utilities as a group to provide certain specified information and analyses in their IRP filings and Appendix G filings. The quoted language, in light of the remainder of the Interim Order can reasonably be construed to mean only that Kentucky Power should make sure that it is in a position to pursue an extension prior to December 31, 2004 should the Company determine that such a course of action is appropriate and feasible, given all of the surrounding circumstances.

Kentucky Power seeks clarification of this matter simply to protect its rights. As we will discuss below, there are substantial questions regarding the Commission’s authority and jurisdiction to direct the Company to extend the agreements. However, the Interim Order, taken as a whole, strongly suggests that it is premature to raise any such questions. The Company asks

the Commission to affirm that any such challenges are not yet ripe, because the Interim Order does not direct Kentucky Power to extend the agreements.

If, on the other hand, the Commission did intend the language in question to constitute a directive to extend the agreements, or if the Commission declines to provide the requested clarification, Kentucky Power seeks rehearing, for the reasons stated in the following section.

#### **IV. REQUEST FOR REHEARING**

If the Commission intends the statement discussed above as a directive to Kentucky Power to extend the Rockport unit power agreements, such a directive is unlawful on a number of grounds. First, the Commission's approval of the proposed extension was granted in the context of its approval of AEP's corporate separation proposal. AEP's decision not to go forward with that proposal removes the underlying rationale for the related proposal to extend the agreements. Second, the Commission lacks authority to direct the means by which a utility must meet its obligation to provide adequate service. Third, the Commission lacks jurisdiction over the unit power agreements, and therefore, the authority to direct changes in the provisions of such agreements, including the term and termination provisions.

##### **A. Kentucky Power's Proposal to Extend the Agreements Was Made in the Context of AEP's Corporate Separation Proposal, Which has Not Been Implemented.**

The Interim Order refers to the Commission's approval of AEP's plan to extend the Rockport unit power agreements in its December 17, 2002 Order in Case No. 2002-00039. That Order did not direct Kentucky Power to enter into the contract extensions. It merely approved AEP's proposal to do so, as part of an order granting certain approvals requested by Kentucky Power in connection with a proposal to change the corporate structure of the AEP System. Under the corporate restructuring proposal, the AEP Interconnection Agreement (pool

agreement) was to be amended to exclude generating facilities owned and load served by Ohio Power Company and Columbus Southern Power Company. This Commission's staff and Kentucky intervenors raised concerns regarding a reduction in resources available to Kentucky Power to allow the Company to serve its native load, should the size of the AEP System pool be reduced, as proposed. AEP agreed to the extension of the Rockport agreements to alleviate these concerns and to obtain the requested Commission approvals. Now that AEP has decided not to implement its corporate restructuring proposal, the underlying predicate for AEP's agreement to extend the agreements no longer exists. The Commission's approval of that course of action, given, as it was, in the context of the approvals then being sought cannot reasonably be translated into a requirement to accomplish the extensions regardless of the surrounding circumstances.

**B. The Commission Does Not Have Authority to Direct the Manner in which an Electric Utility Fulfills its Duty to Provide Adequate Service.**

KRS 278.030 requires every Kentucky utility to furnish "adequate, efficient and reasonable service." However, the means by which a utility complies with this requirement are left to the discretion of the utility's management. The Commission's Integrated Resource Planning (IRP) regulation, 807 KAR 5:058, provides detailed lists of data and alternatives to be considered by electric utilities in meeting the requirement to provide adequate service, and requires the utilities to file their plans for Commission review. But the IRP regulation does not provide for the Commission to approve or disapprove a utility's plan, or to mandate any specific action on the utility's part. Section 11 of 807 KAR 5:058 merely provides for the Commission to make suggestions and recommendations on a utility's IRP, and requires the utility to respond to those suggestions and recommendations in its next IRP report.

Therefore, to the extent that the Commission's language can be construed as a directive for Kentucky Power to extend the Rockport agreements, the Commission simply lacks the statutory authority to issue such a directive.

**C. The Commission Lacks Jurisdiction over the Rockport Unit Power Agreements.**

The Rockport Unit Power Agreements are filed with and subject to the jurisdiction of the Federal Energy Regulatory Commission (FERC). The Commission, therefore, has no jurisdiction over these agreements, and cannot direct their content, including the term and termination provisions. The Kentucky Court of Appeals has already ruled that this Commission was preempted from disallowing costs incurred by Kentucky Power under these agreements.<sup>4</sup> It follows that the Commission cannot direct Kentucky Power to change the terms of the agreements.

**V. CONCLUSION**

Kentucky Power respectfully requests the Commission to clarify that its March 29, 2004 did not direct Kentucky Power to extend the Rockport agreements. To the extent the order so provides, Kentucky Power respectfully requests a rehearing for the reasons set forth above.

Respectfully submitted,



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<sup>4</sup> *Kentucky Power Company v. Kentucky Public Service Commission*, Ky. App., 86-CA-1031-MR (June 3, 1988).

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**CERTIFICATE OF SERVICE**

I do hereby certify that a copy of the foregoing was served upon the following by United States Mail, postage prepaid, this 19<sup>th</sup> day of April, 2004:

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